IN THE

Supreme Court of the United States

October Term, 1976

No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

Petitioners,

vs.

FRED L. HARTLEY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

WILLIAM A. MASTERSON,
333 South Hope Street—48th Floor,
Los Angeles, Calif. 90071,
Attorney for Petitioners.

ROBERT C. LOBDELL,
WILLIAM A. NIESE,
SHEPPARD, MULLIN, RICHTER & HAMPTON,
333 South Hope Street—48th Floor,
Los Angeles, Calif. 90071,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Index to Appendices

TABLE OF AUTHORITIES CITED

Cases Page

Rules

Statutes

Publications

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

Petitioners,

vs.

FRED L. HARTLEY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

This is a libel action involving public figures and matters of public interest. Pursuant to Supreme Court Rule 19, petitioners pray for a writ of certiorari to review a decision of the California Court of Appeal, Second Appellate District, which reversed a summary judgment in their favor. The California Supreme Court denied a hearing of this matter on April 22, 1976.

Opinions Below.

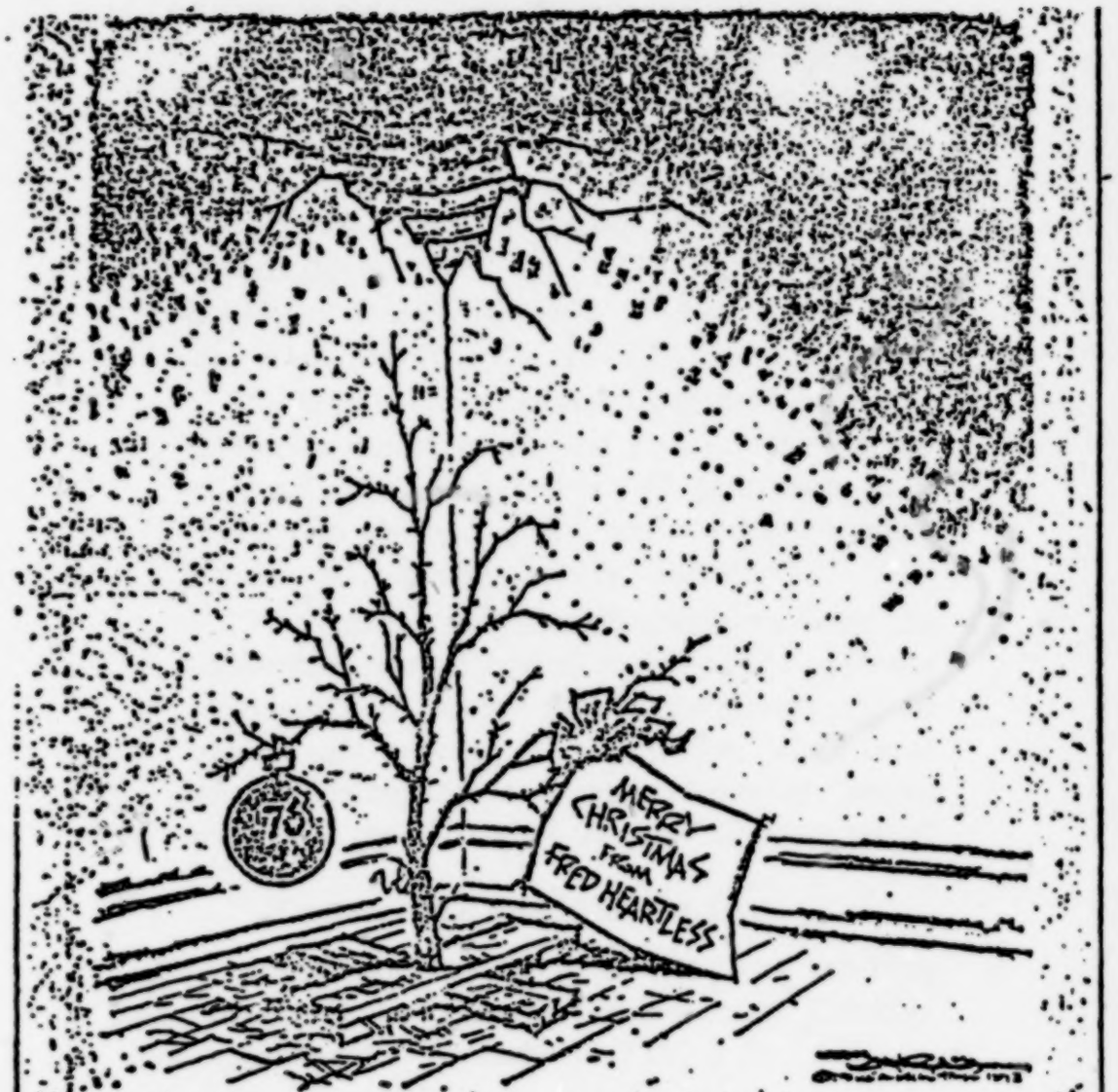
The opinion of the California Court of Appeal is attached as Appendix A. The order of the California Supreme Court denying a hearing of petitioners' petition from the adverse decision of the California Court of Appeal is attached as Appendix B.

Jurisdiction.

On February 3, 1976, the California Court of Appeal entered its opinion reversing the trial court's order of summary judgment for petitioners. On April 22, 1976, the California Supreme Court denied petitioners' petition for hearing from the adverse decision of the California Court of Appeal. This petition for writ of certiorari is therefore timely under 28 U.S.C. § 2101 (c). The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and in accordance with Supreme Court Rule 19.

Questions Presented.

At the height of the fuel and energy crisis in December, 1973, the federal government ordered the diversion to Guam of a Union Oil Company of California ("Union") tanker carrying low sulphur oil bound for the Los Angeles Department of Water and Power. On December 20, 1973, petitioner Los Angeles Times ("The Times") published an editorial cartoon (see opposite page) expressing an opinion sharply critical of the apparent indifference of Union and respondent Fred L. Hartley, Union's president ("Hartley"), to the plight of Los Angeles, created by the diversion of the tanker and their unexplained failure to take any steps to mitigate the loss suffered by Los Angeles as a result of the diversion. Union and Hartley sued for libel. The trial court ruled that Hartley and Union were public figures and granted petitioners a summary judgment on the principles set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). The California Court of Appeal reversed, and the California Supreme Court denied a hearing.



Federal government diverts 500,000 barrels of Union crude oil from Southern California to Guam.—News item

The questions presented on this Petition for a Writ of Certiorari to the California Supreme Court are:

(1) Was the standard applied by the California Court of Appeal of a "possible" defamatory meaning to the editorial cartoon constitutionally permissible, in view of this Court's decisions in *Greenbelt Coop. Pub. Ass'n v. Bresler,* 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970); and *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974)?

(2) Was it constitutionally permissible for the California Court of Appeal to shift the burden of proof of "actual malice" to petitioners in a libel action assumed by that court to involve public figures and matters of public interest?

(3) Was it constitutionally permissible for the California Court of Appeal to reverse the summary judgment and thereby subject petitioners to the burden and expense of a jury trial when there was no defamation and no evidence of "actual malice" in the *New York Times v. Sullivan* sense?

Constitutional Provisions Involved.

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U.S. Const., amend. I.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., amend. XIV, § 1.)

Statement of the Case.

On March 27, 1974, Hartley and Union as plaintiffs filed a complaint for libel in the Los A geles Superior Court against petitioners The Times, The Times Mirror Company, Otis Chandler, Anthony Day and Paul Conrad. The Times is a newspaper division of petitioner The Times Mirror Company. Chandler is the publisher of The Times; Conrad is one of its cartoonists; and Day is editor of The Times editorial pages. The complaint alleged that the editorial cartoon published on December 20, 1973 was defamatory as to Hartley and Union.

After the action was at issue, petitioners moved for a summary judgment on the grounds that the cartoon was constitutionally protected under *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) and successor cases and that the cartoon was not defamatory. Their moving papers in support of that motion showed the following facts.

The fuel and energy crisis had been developing for some years but became acute at the time of the

Yom Kippur War in October, 1973 and the subsequent Arab oil embargo. In late 1973 the crisis was of utmost public concern in Los Angeles; it dominated the local news since it posed the real threat that in a short time Los Angeles would be without energy. It was one of the two most prominent news stories of the day, rivaling Watergate in coverage.

The cartoon in question commented upon the plight of Los Angeles caused by the federal government's diversion to Guam of a Union tanker bound for the Los Angeles Department of Water & Power ("DWP") with 500,000 barrels of low sulphur fuel and the position of Union and Hartley in connection with the diversion. The events which provided the context for the cartoon and Hartley's participation in them were as follows.

Since 1964 Hartley has been the president of Union, one of the largest oil companies in the United States and at the time of the cartoon the fifth largest industrial concern headquartered in California. [C.T. 244.]* In that position, Hartley made public appearances and public statements defending or supporting Union's position in a myriad of matters. He was outspoken on numerous subjects of public interest and his views were reported in newspaper and television broadcasts. Hartley rose to national prominence in 1969 during the Santa Barbara channel oil spill and the ensuing debate thereon. His famous remarks about the plight of birds affected by the oil spill were widely quoted (and mis-quoted) in news media across the nation.

*References herein to the Clerk's Transcript before the California Court of Appeal, containing the pleadings, affidavits and exhibits thereto before the trial court, are shown as "C.T." A copy of such transcript has been furnished to this Court pursuant to Supreme Court Rule 21.

[C.T. 119, *et seq.*] Subsequent to the channel oil spill, Hartley regularly expressed his views on such varied subjects as the propriety of additional drilling in the Santa Barbara channel (The Times, January 1, 1970); smog prevention (The Times, April 30, May 7, 1970); inflation (The Times, December 10, 1970); gasoline to meet EPA emission requirements (The Times, October 7, 1972); and smog and federal emission standards (The Times, March 27, 1972). [C.T. 110, *et seq.*]

Hartley became involved publicly with the fuel crisis as early as May, 1973. At that time, he told Union shareholders that the gravest problem then facing our country was the energy crisis. At a California Assembly Transportation Committee hearing in June, 1973, Hartley and other oil executives warned that the fuel crisis was very real. They assured the committee that public agencies would be supplied with fuel by the companies with whom they had previously done business. And in October, 1973, at a Rotary Club meeting in Southern California, Hartley expressed his view that the energy and fuel crisis was one of consumption, not production. [C.T. 122.]

As the fuel crisis reached its peak in Los Angeles in December, 1973, Hartley became more involved and volunteered numerous possible solutions. Reacting to a suggestion of the Ad Hoc Energy Conservation Committee of a 25% reduction in consumption by Los Angeles users, Hartley testified that such a reduction would force Los Angeles refineries to shut down. He suggested, as alternatives for saving energy, the closing of shopping centers one day a week, eliminating the Sunday edition of The Times and cancelling some radio and television programs. [C.T. 96.]

Hartley's voice, although prominent, was not the only one warning of the impending fuel crisis. As early as April, 1973, DWP spokesmen warned of the critical energy shortage in Los Angeles. [C.T. 75, 79.] The situation became more acute at the time of the Arab oil embargo. Public agencies in Los Angeles recommended both voluntary and compulsory energy curtailment programs, including suggestions of "rolling blackouts" and limitations on the length of the work week. [C.T. 83-93.] An Emergency Energy Committee, formed by the Los Angeles City Council, recommended on December 13, 1973 that there be cuts of 10 to 33 percent in electricity consumption. [C.T. 94-105.]

In the midst of this crisis the subject of the diversion of the tanker was raised by Hartley on December 17, 1973. At a meeting of the Emergency Energy Committee and local oil executives, Hartley revealed that 500,000 barrels of Union low sulphur oil which were supposed to go to DWP as a part of its January shipments had been diverted to Guam by the federal government. In response, a DWP spokesman stated that unless the situation changed rapidly, only one-half of the oil necessary for it to operate would be available by March or April, 1974. [C.T. 106.] An article appearing in The Times on December 19, 1973 stated that much confusion concerning the diversion of the tanker existed, that Union had said it was not going to spread this loss among all of its customers, and that only DWP would be affected. Union's position was that it had not been a "traditional" supplier to DWP for fuel, a statement contradicted by DWP. The article further stated that The Times had tried to contact Hartley regarding this matter but was told

by Union officials that he was too busy with other matters to discuss this situation. [C.T. 108.] In an editorial appearing on the same day, December 19, 1973, The Times questioned why DWP had to bear the total burden of the diversion. [C.T. 107.]

So at a time when critical conservation measures were being implemented in Los Angeles and at a time when the citizens and business community of Los Angeles found themselves in the grip of an emergency generated by the energy crisis, 500,000 barrels of oil were diverted from the City. Thus, a serious question concerning the diversion was raised as to why DWP was the only customer of Union to suffer as a result of the government order.

Union's response was that it was not a "traditional" supplier to DWP. [C.T. 108.] But the same news story [C.T. 108] reported that a DWP spokesman told The Times that Union had supplied oil to DWP "many times in the past." It further appeared that Union need not have taken this precipitous action at the expense of the Los Angeles consumers. The federal order suggested use of a tanker bound from Alaska for the diversion to Guam, but Union elected to use the tanker bound from Indonesia since it was closer to Guam. [C.T. 108.]

It was in the context of this background and the public controversy engendered by Hartley's and Union's statements (and failures to make statements) that the cartoon appeared on December 20, 1973. It expressed an opinion sharply critical of Union's and Hartley's apparent indifference to the plight of Los Angeles, as evidenced by their apparent willingness to allow the entire brunt of the diversion to fall on Los Angeles.

On the above uncontradicted factual showing, the Los Angeles Superior Court granted petitioners' Motion for Summary Judgment. It ruled that Hartley and Union were "public figures", that the cartoon was constitutionally protected under the First Amendment, that there was no evidence of petitioners' alleged "actual malice", and that the cartoon was not defamatory. Hartley appealed, but Union did not and the judgment against Union became final.

The California Court of Appeal reversed, erroneously holding that the cartoon was defamatory since, according to the court, a "possible implication" of the cartoon was that it accused Union and Hartley of causing the diversion.* The Court also held that petitioners had the burden of disproving "actual malice" in the *New York Times v. Sullivan* sense. (Appendix A, pp. 8-9.)

*The court correctly rejected Hartley's claim that the appellation "Fred Heartless" was defamatory. Appendix A, p. 4.

REASONS FOR GRANTING THE WRIT.

The cartoon in question was an expression of opinion about public figures on a matter of vital public interest and concern. It was made at a time when the subject matter thereof, *viz.*, the federal government's diversion of the tanker and Union and Hartley's indifference with respect thereto, presented Los Angeles with its gravest crisis in recent history. Since the cartoon expresses only opinion, it is constitutionally protected under numerous decisions of this Court, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974); and *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970). (See Point I, below.)

The Court of Appeal compounded its error by placing upon petitioners the constitutionally impermissible burden of proving that they did not act with "actual malice" in making the alleged defamatory statement which the Court said was a "possible" implication to be drawn from the cartoon. (See Point II, below.)

Finally, by reversing the summary judgment in petitioners' favor, the California Court of Appeal imposed upon petitioners the burden and great expense of a jury trial in a case which concededly involves public figures and matters of public interest, in which there was no defamatory statement and in which the plaintiff made no showing of "actual malice" on the part of petitioners. (See Point II, below.)

The courts of California cannot be permitted to apply these constitutionally impermissible standards to

political cartoons which express opinions critical of public figures on issues of serious public concern. If allowed, and if summary judgment in such cases is not required, the very purpose of the *New York Times v. Sullivan* rule to promote open, uninhibited and robust debate and criticism will be rendered meaningless.

POINT I.

The Court of Appeal Committed Error of Constitutional Magnitude by Failing to Apply Those Standards Enunciated by This Court to Determine Whether a Publication Is Defamatory.

A. Hartley and Union Are Public Figures.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974), this Court defined two categories of "public figures." The first category includes those who are "public figures" because of their general prominence:

> "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (418 U.S. at 345, 41 L. Ed. 2d at 808.)

The second category includes those who are public figures because of their direct connection with a particular issue of public interest and concern:

> "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (418 U.S. at 352, 41 L. Ed. 2d at 812.)

Union conceded *sub silentio* in the trial court that it was a "public figure" and its failure to appeal confirms that position. As to Hartley, the trial court ruled that he was a public figure and the Court of Appeal correctly assumed for the purposes of its decision that he was such. (Appendix A, p. 8.) In support of that ruling, petitioners point to the above undisputed facts, including Hartley's presidency of one of this nation's largest oil corporations, all of which show his general, continuing prominence in the community. [C.T. 96, 110, 119.] This satisfied the first, or general renown category of *Gertz*.

With respect to the second category suggested by *Gertz*, Hartley's "participation in the particular controversy" which gave rise to the alleged defamation was direct and continuing. The "particular controversy" was the energy crisis affecting Los Angeles, specifically the diversion of the oil tanker from Los Angeles and Union's and Hartley's apparent decision to let the brunt of the diversion fall on Los Angeles. This was one of the most important news stories in Los Angeles at the time and Hartley was a central participant in that controversy.

In both of the above respects, general renown and participation in the particular controversy, Hartley is different from the plaintiffs in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) and *Time, Inc. v. Firestone*, ... U.S. ....., 47 L. Ed. 2d 154, 96 S. Ct. ..... (1976). Unlike *Gertz*, Hartley was not dragged into a controversy with which he had only a remote connection. He was a direct and leading participant in the controversy and, with Union, a cause thereof due to the decision to let the onus of the diversion fall on Los

Angeles. It was Hartley's voluntary actions and statements that thrust his personality and that of Union "into the 'vortex' of an important public controversy." [*Cf. Associated Press v. Walker*, 388 U.S. 130, 155, 18 L. Ed. 2d 1094, 1111, 87 S. Ct. 1975, 1991 (1967).]

And unlike plaintiff Firestone, Hartley was not involved in that which this Court found was essentially a private matter in which no legitimate public interest could be found. It is difficult to think of a situation which aroused more concern in Los Angeles in the latter part of 1973 than the fuel and energy crisis which had been growing for a substantial period of time, was exacerbated by the Yom Kippur War and the Arab oil embargo, and then further intensified by the federal government's diversion of the tanker. The public nature of this matter bears no similarity to the subject of the marital travails of Mr. and Mrs. Firestone. As the Court noted in *Firestone*, (47 L. Ed. 2d at 163):

> "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."

B. The Cartoon Involves Only Opinion on Public Figures on Matters of Serious Public Interest and Is Therefore Constitutionally Protected Under New York Times v. Sullivan and Its Progeny.

Apart from the admittedly true caption stating that the federal government ordered the diversion of the tanker, the cartoon contains no statements of fact. Its content is limited to an opinion critical of the

attitude, actions, and failure to act of Union and Hartley in relation to the federal diversion, which at that time was of utmost public concern. Statements of opinion, albeit critical in nature, about public figures on matters of public interest, are constitutionally protected under *New York Times v. Sullivan* and its progeny.*

The cartoon in question is a prime example of the venerable art of political criticism and opinion by graphic depiction. There are several essential features to this art. The serious cartoonist is attempting to make a significant statement about the events of his day by means of one picture and a single caption. This requires a telescoping of concepts whereby a complex series of events, and a comment with respect to them, is conveyed at a glance. Political cartooning also involves the use of symbols, which are a shorthand for the convenience not only of the cartoonist but for the viewer as well. By means of a caricature of the events or persons depicted, the drawing attempts to capture the essence of the situation.

In this case the cartoonist desired to express an opinion concerning a matter of critical importance to the citizens of Southern California, namely, the fuel shortage and energy crisis. [C.T. 127.] He also wanted to express an opinion that was critical of Hartley's and Union's apparent indifference to the critical situa-

*Even if this were a common law defamation case, the expressions of opinion contained therein would not be actionable under state law. *Miller v. Bakersfield News-Bulletin, Inc.*, 44 Cal. App. 3d 899, 119 Cal. Rptr. 92 (1975); *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974); *Correia v. Santos*, 191 Cal. App. 2d 844, 13 Cal. Rptr. 132 (1961, hearing denied); *Taylor v. Lewis*, 132 Cal. App. 381, 22 P.2d 569 (1933); *Eva v. Smith*, 89 Cal. App. 324, 264 Pac. 803 (1928); *Cowan v. Time, Inc.*, 245 N.Y.S. 2d 723 (1963).

tion created by the diversion of the tanker and their unexplained failure to take any steps to mitigate the loss suffered by Los Angeles as a result of the diversion. [C.T. 127.] The cartoonist did so by portraying a barren room with a withered Christmas tree, devoid of decoration save one hanging ornament. [C.T. 127.] By a single drawing with a terse caption, a caustic, biting comment was made with regard to the actions of Hartley and Union during the heart of the energy crisis. The cartoon was published just five days prior to Christmas. The usual festive air of the holidays had been dampened by a concern for conservation of fuel and the imposition of measures designed to conserve energy. Boulevards normally decorated with Christmas lights were dark. The public was exhorted to minimize or eliminate its use of Christmas decorations. In short, on December 20, 1973 the public could readily associate the energy crisis with a barren, lightless tree.

As a matter of constitutional law, an expression of opinion such as this cartoon is not actionable. In *Gertz*, this Court held that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (418 U.S. at 339-340, 41 L. Ed. 2d at 805.)

In *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974), a companion decision to *Gertz*, plaintiffs were accused in the course of a labor dispute of having "rotten principles," lacking "character" and of being "traitors."

In reversing a libel judgment for plaintiffs, this Court held:

> "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. Gertz v. Robert Welch, Inc. . . . But, in our view, the only factual statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.
>
> "The . . . use of words like 'traitor' cannot be construed as representations of fact. As the Court said long before Linn, in reversing a state court injunction of union picketing, 'to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist —is not to falsify facts.' (Citation). Such words were obviously used herein in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' Gertz v. Robert Welch, Inc." (418 U.S. at 284, 41 L. Ed. 2d at 761-762.)

Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970) is directly in point. There the defendant newspaper commented and reported on plaintiff's negotiating position at a city council meeting on zoning as being "blackmail."

In reversing a jury verdict for plaintiff, this Court held that the references to "blackmail" were not defamatory, stating:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. . . .
>
> "To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." (398 U.S. at 14, 26 L. Ed. 2d at 15.)*

The above decisions hold that expressions of opinion are not actionable when they involve public issues and public figures. In *Greenbelt* this Court held that the plaintiff was not accused literally of being a blackmailer. And in this case it is only by a strained interpretation of the cartoon that Hartley and Union could claim that it accused them of being responsible for the diversion of the tanker. The only "fact" stated

---

*For a California Court of Appeal decision in accord with *Greenbelt,* see *Yorty v. Chandler,* 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970).

in the cartoon was the caption. Hartley and Union made no showing that the statement that the federal government ordered the diversion of the oil tanker was false. No such showing could have been made because the caption was factually accurate in all respects. To conclude, as the Court of Appeal did, that the cartoon charged Hartley and Union with the diversion of the tanker is to take the cartoon and stand it on its head.*

In the decision herein the Court of Appeal engaged in tortured and convoluted syllogism to reach the untenable conclusion that the cartoon accused Hartley and Union of having some causal relationship to the federal diversion order. As conceded by the Court of Appeal, this conclusion could not have been reached by anyone familiar with the fuel and energy crisis which existed at the time the cartoon was published. (Appendix A, p. 5.) But contrary to the holding

*The Court of Appeal misapplied *MacLeod v. Tribune Publishing Company, Inc.*, 52 Cal. 2d 536, 343 P. 2d 36 (1959) in formulating the bizarre rule that the standard for determining defamation was whether the cartoon contained a "possible implication" of a defamatory meaning when viewed by the eyes of the average reader. (Appendix A, p. 8.)

MacLeod, decided five years before *New York Times v. Sullivan*, imposed no such standard of a "possible implication" or possible defamatory meaning. In *MacLeod* the sting of the alleged libel was that the Peoples World, a communist line newspaper, endorsed plaintiff for an election, and that therefore plaintiff was a communist sympathizer or fellow traveler. (p. 544.) The defense was that there was an "innocent meaning" to the alleged defamation, *i.e.*, that communist support does not necessarily reflect communist sympathy on the part of the person supported. (p. 548.) In rejecting that "innocent meaning" defense, the *MacLeod* Court did not mandate a "possible" defamatory meaning test. It intended only to do away with what it called a "hair splitting analysis" and to prevent a clever defamer from casting grossly defamatory charges in ambiguous language. *MacLeod* held that such analysis has no place in the law of defamation ". . . dealing as it does with the impact of communications between ordinary human beings". (p. 550.)

of *Greenbelt*, the Court of Appeal assumed a special class of uninformed readers against whom the impact of the cartoon was to be measured. (Appendix A, pp. 6-7.) Such persons presumably were unaware of the fuel and energy crisis in the latter part of 1973, including waiting lines for gasoline, admonitions against Christmas lights, threats of shortened business hours, the diversion by the government of the tanker with needed fuel oil, etc. Petitioners suggest that such persons (if there were any) would not be ordinary human beings whose reactions should be measured in order to determine whether a publication is defamatory.

It is hard to conceive of any language which is critical in nature that could not have a "possible" defamatory meaning to some person. This is particularly true when dealing in the area of matters of public interest and public figures. This is the exact holding of *Greenbelt* discussed above. There the term "blackmail" was used with reference to the plaintiff. Surely, if there were some who read the news story and did not know of the public controversy, they might assume that the plaintiff was being charged with the crime of extortion. But this Court would not permit such a "possible" meaning or interpretation to stand. It held:

> ". . . even the most *careless* reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. . . ." (398 U.S. at 14, 26 L. Ed. 2d at 15; emphasis added.)

Petitioners submit that if the "careless" reader in *Greenbelt* would not have believed that there was a defama-

tion, then the hypothetical, uninformed reader in the Court of Appeal's opinion would not have so believed.

The law does not require that a court measure the alleged defamatory effect of a publication only upon the uninformed, or unknowing or careless reader. It is to measure its impact upon "ordinary human beings." (*Cf. MacLeod, supra,* 52 Cal.2d at 550.) There is no controversy in this case as to the public furor raised over the diversion of the tanker and the resultant crisis in Los Angeles. Hence there was no reason for the Court of Appeal to (1) hypothesize that there were a number of readers who were oblivious to what was happening around them, and (2) measure a "possible" defamatory effect of the cartoon only upon such readers. Further, even if there were such readers, there was no reason for the Court of Appeal to speculate that such readers would assume a dark purpose on the part of Hartley and Union, or that such readers would assume that Hartley and Union had the power to cause the federal government to do that which the caption said the federal government did. But even if the cartoon was susceptible to an interpretation that in some unexplained way Hartley and Union were connected with the diversion order, the underlying essence of the cartoon is opinion, not a representation of fact.

Under federal constitutional principles, a "possible" defamatory meaning is not permissible as a standard to compel petitioners to be held to trial. The result of the Court of Appeal's decision is to place upon petitioners the difficult and constitutionally impermissible burden of proving at trial what a hypothesized, uninformed group of people did or did not know about one of the gravest moments in recent history.

As conceded by the Court of Appeal, and as is obvious from a reading of the cartoon itself, no reasonably informed reader could have believed other than that the federal government was responsible for the diversion of the oil tanker. The only reasonable interpretation of the cartoon was that the cartoonist was critical of Hartley's and Union's indifference and their decision to let the onus of the diversion fall squarely and singularly upon the residents of Los Angeles. Such expression was one of opinion and not a defamatory statement of fact.

POINT II.

The Court of Appeal Committed Error of Constitutional Magnitude by Placing the Burden of Proof of the "Actual Malice" Issue on Petitioners.

At page 8 of its Opinion the Court of Appeal correctly assumed that the *New York Times* requirements applied since Hartley is a public figure and matters of public interest are involved. The court further stated (Appendix A, p. 8) that petitioners made "a strong showing" as to the basis for their impressions of Hartley's and Union's refusal to allocate the shortfall caused by the diversion of the tanker. The court nevertheless reversed, saying that petitioners:

> ". . . made no effort to demonstrate that there was any basis for a charge that appellant was in some way responsible for causing the diversion order." (Appendix A, p. 8.)

This holding was erroneous since:

> (1) Even if the cartoon were susceptible to any defamatory meaning, petitioners' affidavits showed that they did not act with "actual malice" in the *New York Times* sense; and

(2) Neither Hartley nor Union offered any evidence that petitioners acted either with knowledge of falsity or a reckless disregard for truth.

The burden of proof is on the plaintiff in a *New York Times v. Sullivan* case to prove with convincing clarity not only that a false statement of fact was made, but also that it was made with "actual malice," *i.e.*, knowledge of falsity or reckless disregard for truth. (376 U.S. 254, 279-280, 11 L. Ed. 2d 686, 706.) The showing required to raise a triable issue of fact as to "actual malice" is set forth in *Cervantes v. Time, Inc.*, 464 F. 2d 986 (8th Cir. 1972). There plaintiff complained that defendant had not made available to him "confidential news sources" for the alleged defamation. The appellate court noted this claim as being "not frivolous" but affirmed a summary judgment for defendant, holding that the plaintiff ". . . failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth." (464 F. 2d at 992; emphasis added.)

The Court of Appeal herein failed to recognize and apply the twofold requirement of the *New York Times* rule. To restate, in order for a statement about a public figure to be actionable, the plaintiff must prove that such statement was: (1) defamatory *and* (2) made with knowledge of falsity or a reckless disregard for truth.

The Court of Appeal's holding that petitioners " . . . made no effort to demonstrate that there was any basis for a charge that [Hartley] was in some way responsible for causing the diversion order" (Appendix, p. 8) is erroneous since the court's analysis was incomplete. Assuming, *arguendo*, that the cartoon did falsely

charge Hartley and Union with responsibility for the diversion, only one element of liability under the *New York Times* rule was established, namely that a false statement of fact was made. The other element of liability under the *New York Times* rule which had to be shown was that petitioners acted with knowledge of falsity or a reckless disregard for truth.

Petitioners' affidavits filed in the trial court conclusively demonstrated that even if the cartoon were construed to contain a defamatory statement of fact, any such statement was not made either with knowledge of falsity or a reckless disregard for truth. Those affidavits, none of which were contradicted by Hartley or Union, showed that at the time of the publication, petitioners had knowledge of the following facts:

(1) The existence of the fuel and energy crisis in Los Angeles;

(2) The diversion of the tanker by the government;

(3) Hartley's and Union's decision to use the tanker bound for Los Angeles;

(4) Hartley's and Union's decision to let the entire "shortfall" fall on Los Angeles and not spread it among Union's various customers;

(5) Hartley's and Union's apparent disinclination to answer the host of questions raised by the above facts; and

(6) The great concern felt by public agencies and the Los Angeles citizenry by reason of the diversion and Hartley's and Union's apparent indifference to the crisis. [C.T. 67-129.]

Further, such affidavits make clear that petitioners did not charge, nor intend to charge, that Hartley

and Union were responsible for the government diversion order. [C.T. 73, 127.]

There was not one shred of evidence before the trial court to show that petitioners had any reason to believe that the above facts were untrue, or that they acted recklessly with respect thereto. All of the evidence was that petitioners believed these facts to be true and had good reason to believe them. [C.T. 67-129.]

On this record, the trial court had no alternative but to grant the motion for summary judgment, even if the cartoon were susceptible to a defamatory meaning. This is so since the constitutional standard is that petitioners had no liability unless it was shown that they acted with "actual malice," *i.e.*, knowledge of falsity or reckless disregard for truth.

POINT III.

This Court Should Grant Certiorari so as to Confirm That Summary Judgment Is the Proper Method for Disposition of a New York Times v. Sullivan Case.

The seemingly endless efforts to restrain the fundamental rights of free speech and a free press, whether by governmental regulation, private litigation, or otherwise, require a continual reiteration of these liberties in the lexicon of the rights of the American people. The history of judicial protection of speech and press is long and honorable, and it therefore is appropriate to recall Justice Cardozo's admonition that free speech is the "matrix, the indispensable condition, of nearly

every other form of freedom." (*Palko v. Connecticut*, 302 U.S. 319, 327, 82 L. Ed. 288, 293, 58 S. Ct. 149, 152 (1937).) As this Court recently said:

> "Those guarantees [of freedom of speech and press] are not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389, 17 L. Ed. 2d 456, 468, 87 S. Ct. 534, 543 (1967)

Following this Court's landmark decision of *New York Times v. Sullivan*, various federal and state courts have utilized the summary judgment procedure as the most effective means of implementing the constitutional protection afforded by *New York Times*. For example, *Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) holds:

> "Moreover, because of the importance of free speech, summary judgment *is* the 'rule,' and not the exception, in defamation cases."

Summary judgment is and should be the "rule" in such cases since:

> "The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as the fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes." (*Washington Post Co. v. Keogh*, 365 F. 2d 965, 968 (D.C. Cir. 1966).)

This principle is also found in *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F. 2d 438 (9th Cir. 1974):

> "We agree with our brothers of the District of Columbia and Fifth Circuits that it is important

that judges focus attention on summary judgment . . . in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' To be the unprotected, actual malice must be shown with 'convincing clarity.' *New York Times, supra,* 376 U.S. at 285-286, 84 S. Ct. at 728-729." (492 F. 2d at 441.)

See also:

Wasserman v. Time, Inc., 424 F. 2d 920 (D.C. Cir. 1970) [concurring opinion]; *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858, 864-865 (5th Cir. 1970); *Cerrito v. Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), aff'd 449 F. 2d 306 (9th Cir. 1970); *MacNeil v. Columbia Broadcasting System, Inc.*, 66 F.R.D. 22 (D.C. Cir. 1975); *Fram v. Yellow Cab.*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Meeropol v. Nizer,* 381 F. Supp. 29 (S.D.N.Y. 1975).

The vice of failing to follow the rule of summary judgment in a *New York Times* case is shown in this matter. Here the California Court of Appeal has declined to follow its legal duty to assess the alleged defamatory nature of a publication in line with decisions

of this Court. Rather it enunciates a standard of a "possible" defamatory implication to an ignorant or uninformed reader and would allow that standard to be applied by a lay jury. Additionally, the court made no judicial examination and close scrutiny of the evidence to determine whether Hartley had offered any evidence to show that petitioners acted with "actual malice." This approach totally disregards this Court's mandate of *New York Times v. Sullivan* and its progeny and ignores the established summary judgment procedure developed by those courts which have followed this Court's direction.

* * *

In sum, the decision of the California Court of Appeal strikes at the very purpose of the constitutional privilege of free speech and free press in two important ways. First, by a strained and tortuous interpretation of the cartoon, it decrees a totally unreasonable standard for determining whether political and social criticism is defamatory.

Secondly, the California Court of Appeal requires that petitioners, in a case involving "public figures", prove that they did not make a false statement about Hartley and Union with "actual malice." This is not the law, and can only serve to create an atmosphere of fear and timidity upon those who would give voice to public criticism. This Court has pointed out in *New York Times v. Sullivan* that First Amendment freedoms cannot survive in such an atmosphere. (376 U.S. 254 at 278, 11 L. Ed. 2d at 705.)

Conclusion.

The purpose of the *New York Times v. Sullivan* rule is to promote open, uninhibited and robust debate and criticism of public figures and matters of public interest. Historically, social and political cartooning has been an important means of effecting such criticism. The cartoon in this case is a prime example of this venerable art. Its purpose was comment and criticism directed to an extremely topical matter. That is the nature of this form of expression. To shackle a cartoonist, by prohibiting his use of symbolism and caricature to convey his comment and criticism, cuts squarely across his constitutional privilege of free expression and the public's right to consider his comment and criticism.

For the foregoing reasons, the decision of the Court of Appeal should be reversed and the judgment for petitioners reinstated.

Dated: July 15, 1976.

Respectfully submitted,

WILLIAM A. MASTERSON,
Attorney for Petitioners.

ROBERT C. LOBDELL,
WILLIAM A. NIESE,
SHEPPARD, MULLIN, RICHTER & HAMPTON,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Fred L. Hartley, Plaintiff and Appellant, v. Paul Conrad, The Times Mirror Company, a corporation, Los Angeles Times, a division of The Times Mirror Company, Otis Chandler and Anthony Day, Defendants and Respondents. 2d Civ. No. 46012, (Superior Crt. No. C 83707).

Filed: February 3, 1976.

APPEAL from judgment of the Superior Court, Los Angeles County. Norman J. Dowds, Judge. Reversed.

Frank J. Kanne, Jr., for Plaintiff and Appellant.

Robert C. Lobdell, William A. Niese, Sheppard, Mullin, Richter & Hampton, and William A. Masterson, for Defendants and Respondents.

Fred Okrand, Jill Jakes, Daniel C. Lavery and Mark D. Rosenbaum, for American Civil Liberties Union of Southern California, as Amicus Curiae, on behalf of Defendants and Respondents.

THE COURT:*

Plaintiff, Fred L. Hartley (appellant), the President of Union Oil Company of California, appeals from an adverse summary judgment, entered against him in a libel action. Defendants below (respondents here) are The Times Mirror Company, and its officers or employees Otis Chandler, Anthony Day and Paul Conrad. We reverse.

---

*Before Allport and Potter, J.J., and Cole, J. assigned by the Chairman of the Judicial Council.

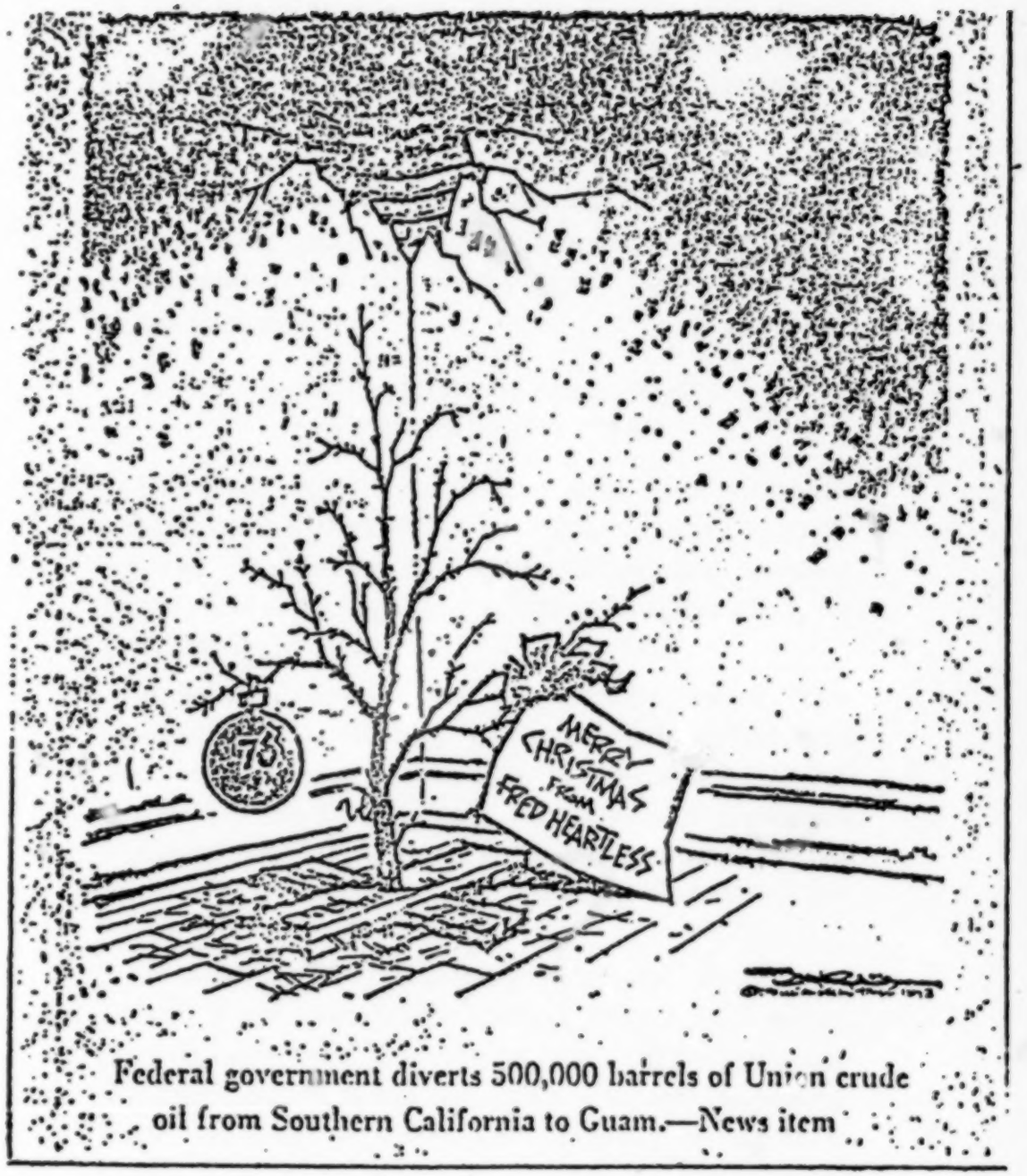
The claimed libel is based upon a cartoon appearing in the Los Angeles Times, the newspaper published by The Times Mirror Company. The cartoon and its caption are reproduced here:

APPLICABLE LAW

If a claimed libelous publication is susceptible of an innocent as well as a defamatory interpretation, a jury question is presented; if, however, there can be only one reasonable interpretation of the claimed libel, and that interpretation is nonlibelous "a court is required to rule as a matter of law that the material is not defamatory, and it is not allowed to submit the issue to a jury. This has always been the rule in California [citations omitted] and in recent years it has also become part of the guaranty of free speech under the First and Fourteenth Amendments to the federal Constitution. [citations omitted.]" (*Yorty v. Chandler* (1970) 13 Cal.App.3d 467, 475-476.)

If more than one meaning could be derived by the average reader, a question is presented for the jury's determination. (*MacLeod v. Tribune Publishing Co.*, (1959) 52 Cal.2d 536, 546-547.) In *MacLeod* our Supreme Court disapproved the "possible-innocent-meaning" rule which had appeared in several earlier cases.[1] This rule was to the effect that where challenged language had a possible innocent meaning it was not defamatory on its face. Rejecting that rule, the Supreme Court stated that its effect was to protect "not the

[1]*Peabody v. Barham* (1942) 52 Cal.App.2d 581; *Washer v. Bank of America* (1943) 21 Cal.2d 822; *Babcock v. McClatchy Newspapers* (1947) 82 Cal.App.2d 528; *Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486; *Menefee v. Codman* (1957) 155 Cal.App.2d 396; and *Jeffers v. Screen Extras Guild, Inc.*, (1958) 162 Cal.App.2d 717.



Federal government diverts 500,000 barrels of Union crude oil from Southern California to Guam.—News item

innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language." (*MacLeod*, 52 Cal.2d at p. 551.) Further, said the Supreme Court, the provisions of section 45a of the Civil Code defining libel describe "not language susceptible of only one meaning, but language that carries *a* defamatory meaning on its face." (*Ibid.*; emphasis in the original.)

APPLICATION OF MACLEOD TO THE PRESENT CASE

We must hold the cartoon at issue here up to the yardstick prescribed for us by *MacLeod* and determine whether it contains *a* possible defamatory meaning when viewed by the eyes of the average reader. We conclude that it does.

Appellant contends that the cartoon meant "that plaintiff Fred L. Hartley was a heartless person, and that he had been responsible for diverting 500,000 barrels of Union crude oil from Southern California to Guam and that in doing so he had caused Christmas to be dismal, cheerless and bleak in Southern California."

In securing their summary judgment, respondents present declarations which showed, among other things, the following facts: The cartoon appeared on December 20, 1973, during the energy crisis. The federal government had ordered Union Oil Company to divert to Guam 500,000 barrels of oil destined for Los Angeles. The company indicated that this oil would have gone to the Department of Water and Power. The Los Angeles Times in various news articles criticized Union

Oil Company for failing to distribute the loss among all of its customers, instead of charging the full amount to the Department of Water and Power. It was in this context, respondents' declarations stated, that the cartoon was published.

We turn first to the assertion that the cartoon implies that appellant was heartless. It clearly does, but we hold that such implication is an expression of opinion only and cannot be a basis for liability on the part of defendants. (*Yorty v. Chandler, supra,* 13 Cal.App. 3d at pp. 472-473.) Anyone who did know that Union Oil Company had complied with the federal order by charging the entire "shortfall" to the Department of Water and Power, rather than allocating it among all or many of Union's customers, would naturally read the word "heartless" as a critical commentary that the decision was unfeeling and insensitive to the problems of Southern California created by the oil crisis. That is no more than expression of the cartoonist's opinion; it is the precise function he is supposed to perform.

Leaving aside archaic definitions, Webster's Third New International Dictionary (1966, p. 1045) defines "heartless" as "devoid of heart; lacking feeling or affection; unsympathetic, cruel." Roget's International Thesaurus (3d ed. 1972) classifies "heartless" under categories entitled "spiritless", "unfeeling", "despondent", "uncourageous", and "hard-hearted". None of these appellations, in the context of the cartoon in question can be described as making a false statement of *fact* about appellant; however, warranted or unwarranted the cartoonist was in making appellant, as an individual, the object of his criticism, he could express his view

that the challenged decision was "cruel", "unfeeling" or "hardhearted."[2]

It is true, as respondents urge, that anyone knowing the background facts set forth in respondents' declarations, could not reasonably read the cartoon as being susceptible of the implication that appellant Hartley had been responsible for diverting 500,000 barrels of oil from Southern California to Guam. The corollary charge that in making that diversion appellant had caused Christmas to be dismal, cheerless and bleak in Southern California would likewise fail.

The problem with the summary judgment, however, is that we have no warrant for assuming that the average reader will have known the background matters set forth in respondents' declarations nor for assuming that such a reader will give to the cartoon the foregoing innocent and non-libelous interpretation.

Even though the caption of the cartoon explicitly states that the federal government diverted the oil in

---

[2]Appellant refers us to a statement in Prosser, Law of Torts, 4th ed., page 721, that to describe someone as "heartless" is defamatory on its face. The two cases cited by the author do not bear out his statement. The word "heartless" was not used in either of the libels involved. In *MacRae v. Afro-American Company,* 172 F.Supp. 184 (E.D. Pa. 1959), a 19-year-old girl had committed suicide, being despondent over mediocre grades. The libel was a statement that her mother had been extremely displeased over her daughter's scholastic standing and that the daughter had been told by someone, presumably the mother, not to come home unless her grades improved. The court said that in this interpretation, the article meant that the mother was at least partly responsible for the daughter's death. In *Brown v. Du Frey* (1956) 151 N.Y.S. 2d 649; 134 N.E. 2d 469, a wife who had been divorced from plaintiff husband more than 30 years, previously left a will stating that she made no provision for him because during her lifetime he had abandoned her, made no provision for her support, treated her with complete indifference and did not display any affection or regard for her. Neither case has any usefulness here.

question to Guam, the cartoon clearly refers to appellant[8] and to the company of which he is president. Readers not familiar with the story dealing with Union's allocation of the shortfall to the Department of Water and Power might reasonably, it appears to us, view the cartoon as meaning something other than that which respondents attribute to it. Respondent Conrad need not be presumed to have hit the mark in each of his daily cartoons; a reader unacquainted with the claimed background might simply be puzzled and wonder what the cartoon was all about. Such an implication, by itself, would be neutral at the worst. But, the cartoon leaves viewers who lacked the background knowledge set out in respondents' declarations free to speculate as to the nature and extent of the responsibility borne by appellant.

The general tone of the cartoon did not urge its viewers to be charitable in the inferences to be drawn. The "Fred Heartless" pun invited them to think the worst of appellant, in relation to some connection between him and the total situation presented by the cartoon. That total situation included not only the bleak Christmas in store for Southern California but as well the fact that it was the product of a federal government diversion order. Under such circumstances, it is not unreasonable to conclude that a substantial number of viewers of the cartoon might construe it to portray appellant as having some casual relationship to the government diversion order.

Given the status of the energy crisis in December, 1973, anyone whose conduct in any way deprived the average citizen of fuel could well be the object

---

[8]Respondents do not deny that the "Fred Heartless" reference was meant to identify appellant.

of public hatred, obloquy or contempt within the statutory definition of libel. ("Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civil Code, § 45.) This definition "is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation." (*Bates v. Campbell* (1931) 213 Cal. 438, 441; *MacLeod v. Tribune Publishing Co., supra*, 52 Cal.2d at p. 546.) It is not necessary that the plaintiff be charged with any illegal conduct in order for defamation to be shown. (*Stevens v. Snow* (1923) 191 Cal. 58, 62.) The determination whether a false imputation is defamatory must be made on the basis of the temper of the times and contemporary public opinion. (*Washburn v. Wright* (1968) 261 Cal. App.2d 789, 796.)

In *Newby v. Times-Mirror Co.* (1916) 173 Cal. 387, it was held libelous per se to falsely charge that a person was a hypocrite. In *Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643, a charge that a prominent leader in Jewish affairs was "unworthy of his high position in B'nai B'rith, of knowing less about his religion than an adolescent child and of causing all Jewry to look ridiculous" (54 Cal.2d at p. 650) was held libelous per se, even though it did not "reach the extremity of vituperation." (*Id.*) A possible implication of the cartoon, as noted above, is that appellant was involved in exacerbating the fuel shortage. Such a charge is not a mere opinion, but rather a statement of fact.

In these circumstances, and given the strictures of *MacLeod v. Tribune Publishing Co., supra,* we cannot hold that as a matter of law appellant was not defamed.

APPLICATION OF NEW YORK TIMES CO. v. SULLIVAN RULE

Appellant contends that he is not "a public figure", and therefore not subject to the strict requirements of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254. That case establishes that constitutional guarantees of free speech protect utterances relating to public figures unless the utterances are made with malice. "Malice" means that the statements in question were made with knowledge of their falsity or with reckless disregard of their truth. (*Id.* at p. 280; *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 11.)

Respondents contend vigorously that there is no genuine issue of fact as to appellant's status as a public figure. They conclude that he was such, and that *New York Times* requirements apply. For present purposes, we assume that that is the case. Reversal is still compelled, however. While respondents made a strong showing of the basis for their charge that appellant's refusal to allocate the shortfall caused a bleak Southern California Christmas, negating reckless regard of the truth or knowledge of falsity in that respect, they made no effort to demonstrate that there was any basis for a charge that appellant was in some way responsible for causing the diversion order.

DISPOSITION

We hold, therefore, that summary judgment was improperly granted in this case. In so holding, we are not unmindful of the possible impact upon "the most fundamental meaning of a free press." (*Greenbelt Pub. Assn. v. Bresler, supra.*) We recognize that cartoons are meant to criticize; to express pictorially and by sharpened wit a commentary of the artist on the issues of the day. We also recognize that our task is to "ferret out the underlying themes of the cartoon and then determine whether these can reasonably be considered libelous." (*Yorty v. Chandler, supra,* 13 Cal.App.3d at p. 472.) We are, however, bound by *MacLeod v. Tribune Publishing Co., supra,* 52 Cal.2d 536, which clearly involved a public figure. *MacLeod* was decided five years prior to *New York Times Co. v. Sullivan, supra.* If the teaching of the latter case and those which have followed it have eroded the holding of *MacLeod*, it is for our Supreme Court and not for us to take corrective action. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The judgment is reversed.

APPENDIX B.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

April 22, 1976.

I have this day filed Order HEARING DENIED.

In re: 2 Civ. No. 46012, Hartley vs. Conrad.

Respectfully,

G. E. BISHEL
Clerk